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SUPREME COURT, U.S.

NO. 07-1401

In the Supreme Court of the United States

WENDELL J. CALLAHAN, JR. and
JEROME M. COUSAN,
Petitioners

v.

CIRCUIT CITY STORES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
Louisiana Supreme Court
New Orleans, Louisiana, No. 2007-C-2424

REPLY BRIEF

EMERY VOORHIES
616 E. Boston St.
Covington, LA 70433
Phone: (985) 898-0940
La. Bar Roll #13124
Counsel of Record for Petitioners

Maurice Le Gardeur
222 N. Massachusetts St.
Covington, LA 70433
Phone: (985) 892-1420
La. Bar Roll #8274

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The opponent's brief alleges that petitioners have raised no federal issues below; additionally, the opponent alleges that any federal questions which were raised were untimely; therefore, there is no basis for this Court to exercise its *certiorari* jurisdiction. These allegations are patently untrue.

The opponent, Circuit City, was the first litigant to assert its First Amendment right of free speech as a good faith immunity defense to this defamation suit (which was recognized by the Louisiana Supreme Court in *Kennedy*[1], decided by the Louisiana Supreme Court while the instant case was on appeal to the Louisiana First Circuit Court of Appeal.) This *federal question* was not merely a matter of state law as fully discussed in *Kennedy*. As Louisiana Supreme Court Justice Weimer said in *Kennedy*:

> *Whether First Amendment restraints supercede the presumptions of falsity, malice (or fault), and injury that would ordinarily obtain under Louisiana law when a statement is defamatory per se depends upon whether the constitutional protections extended to media defendants in Gertz and Philadelphia Newspapers obtain where the defendant is a private, non-media defendant, a question the Supreme Court has not squarely answered.*

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[1] *Kennedy v. Sheriff of East Baton Rouge,* 935 So.2d 669 at 677, 2005-1418 (La. 7/10/06).

Clearly the Louisiana Supreme Court considered it was dealing with *federal questions* as opposed to the mere application of state law to this alleged *garden variety false arrest/defamation case,* to use opponent's words[2].

By following *Kennedy,* the appellate courts of Louisiana have impermissibly extended the good faith immunity defense sought by Circuit City beyond mere defamatory statements under the First Amendment to a grant of conditional immunity for a clear violation of an innocent victim's Fourth Amendment right to be free from wrongful arrest. The exercise of constitutional rights under the First Amendment should never override the protections afforded innocent victims under the Fourth Amendment. That's what happened in this case and this result should not be countenanced and/or ignored by this Court.

By awarding damages to petitioners, Callahan and Cousan, the trial court refused to apply the good faith immunity sought by Circuit City. Only after the reversal of petitioners' damage awards was it necessary for petitioners to raise Fourth Amendment concerns which were clearly stated in petitioners' application for rehearing, as follows:

> *The First Amendment right to free speech should never trump the Fourth Amendment right to personal liberty and*

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[2]Opponent's Brief in Opposition to Petition for Writ of Certiorari, p. 1.

> *freedom from arrest and prosecution. The malice standard adopted by Kennedy sets the bar too high. A lesser standard is required because of the interests involved - personal liberty and freedom. To hold otherwise constitutes a denial of constitutional access to the courts and fair reparation for extraordinary harm and damages.* [p. A-33, paragraph 3, Petition for Writ of Certiorari]

Under the peculiar procedural posture of this case, the constitutional issues were properly and timely raised and preserved for review by this Court.

Contrary to opponent's assertion, "[F]urthermore, this alleged federal issue is not pursued in the body of the Petition and must be deemed waived,"[3] the constitutional issue; i.e., that the First Amendment analysis of the *Kennedy* court effects a violation of the Fourth Amendment, was directly addressed in the body of the brief by adopting the language of dissenting Judge Hughes, who was quoted as follows:

* * * * *

> *False statements that send the innocent to jail should be scrutinized more closely than mere name calling, even while recognizing and protecting the privilege for reports to the police. A*

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[3]Opponent's Brief in Opposition to Petition for Writ of Certiorari, p. 1.

> *constitutionally based conditional or qualified privilege becomes meaningless when it results in the loss of the ultimate constitutional right, liberty.*[4]

Petitioners did all that was required to preserve these federal constitutional questions. Opponent's mischaracterization of these issues as merely matters of state law deprecates the serious harm suffered by the petitioners due to the violation of their Fourth Amendment rights.

The alleged exercise of opponent's First Amendment right of free speech to report suspected criminal activity should not immunize opponent from damages unless the victim carries an insurmountable burden to prove this report was done maliciously *vice* unreasonably. The Fourth Amendment protects against *unreasonable* searches and seizures, not just *malicious* searches and seizures.

The Louisiana Supreme Court in *Kennedy* has rewritten the Fourth Amendment to the U.S. Constitution to add this unconstitutional condition. This Court should correct this grievous error.

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[4]Petitioners' Original Petition for Writ of Certiorari, p. 19.

Respectfully submitted,

EMERY VOORHIES
616 E. Boston St.
Covington, LA 70433
Phone: (985) 898-0940
La. Bar Roll #13124
Counsel of Record for Petitioners

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Covington, LA 70433
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La. Bar Roll #8274